United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7457

To be argued by
ARTHUR E. McINERNEY

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES MORRISSEY,

Plaintiff-Appellee,

v.

NATIONAL MARITIME UNION OF AMERICA,

and

JOSEPH CURRAN, SHANNON J. WALL and CHARLES SNOW,

Defendants-Appellants.

ANSWERING BRIEF FOR PLAINTIFF-APPELLEE

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PLAINTIFF'S ANSWER TO MR. CURRAN'S APPEAL

The Questions Involved

None of the defendants-appellants (except Mr. Snow) has framed any issue involved in this appeal. It would appear however, from his brief, that the following issues are involved on the Curran Appeal:

1.

Was sufficient evidence presented to warrant the inference that Curran took part in the infringement of plaintiff's rights under the Landrum-Griffin Act?

2.

Was sufficient evidence presented to warrant the inference that Curran was a party to the criminal prosecution?

3.

Was sufficient evidence presented to warrant a finding that Curran's acts were prompted by malice?

4.

May a union official acting under color of and in abuse of the au[illegible] of his union office and with malice be held personally [illegible]e: (a) for violations of a union member's rights un[illegible] MRDA; or (b) for torts committed by such official?*

5.

Was the Court correct in charging the jury that "The Notice" had not been duly promulgated?*

6.

Did the District Court abuse its discretion in refusing to postpone the trial?*

7.

Was the District Court correct in refusing to permit the defendants to attempt to impeach their witness by the use of collateral material?*

Facts

A full appreciation of the facts and their relationship one to another requires a thorough understanding of the nature and character of Joseph Curran. Curran was Presi-

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* These issues appear to be the common issues and as such will not be repeated for the other defendants.

dent of National Maritime Union of America (NMU) and for years he had ruled the union with an iron and fearful hand. As one of his associates said (Exhibit 7):

> "Well to go into Joe (Curran) is a very fearful process," *Morrissey* v. *Curran*, 351 F. Supp. 775, 784. (Parenthetical matter added)

Under his regime the Officers' Pension Fund (OPF) had been foisted on the Union. This plan was overfunded* and created a slush fund which Curran had used and attempted to use to feather the nests of his "court favorites" (Perry,** Snow Nimmo, et al.***).

Even the trustees of this fund were cowered by his dominance (Exhibit 7):

> "The evidence indicates that Curran dominated the people who had anything to do with the payment from the Officers' Plan to Perry," *Morrissey* v. *Curran*, 351 F. Supp. 775, 784.

Into this picture Jim Morrissey had walked. At the time of his arrest and prosecution, a suit was pending, brought by him, which had already sharply limited Curran's right to use this fund (Exhibit 7) and was also threatening judgments for large sums against both Curran and Wall. Perry, Curran's close friend, had been removed as a beneficiary of the fund; Snow had also been removed. So had Nimmo. So had Curran's son, Joe Paul Curran.

Curran was irked, beyond measure, by this threat to his control. He had expressed his feeling *ad nauseum*. Mor-

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* Morrissey brought an action which resulted in $674,222.60 being returned to the Union by OPF (215-217A).

** A separate judgment against Perry in the sum of $263,307.00 was obtained by Morrissey in favor of OPF (Exhibit 7 and 590A).

*** Another separate judgment against Freedman was obtained by Morrissey in favor of OPF in the sum of $272,740.50 (Exhibit 7 and 590A).

rissey was, according to Curran, a "communist" (218A),* he was a "slob" (218A), he was "lower than scum" (380A).

Curran regarded himself as omnipotent. He did not hesitate to chastize our lawmakers and the laws they enacted when he foresaw a threat to his power (741E):

> "Most of you probably recall the spectacular circus put on by Senator McClellan and his so-called Select Committee on Improper Activities in the Labor-Management Field in 1957.
>
> * * *
>
> * * And out of it came the new basic statute known as the Landrum-Griffin Act.
>
> * * *
>
> "The most effective weapons in this viciously anti-labor law were in the section which was designated 'a bill of rights for union members.'
>
> "This section was the brainchild mainly of the committee chairman, Sen. McClellan. He has always been one of the most backward members of the Senate on labors' rights, civil rights, human rights—so you can well imagine the kind of Bill of Rights he would write for union members and why he would want to include such a section in the bill.
>
> * * *"

The arrogance of Curran knew no bounds. Even the Federal Court (District Judge Bonsal) which had made the interim judgment regarding the removal of Perry and Snow from the lucrative officers' pension fund was just

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* Curran's venom spilled over to Morrissey's family too (220A).
"* * * Are you referring to Morrissey's group when you talk about the hostile union group?

A. There were several groups.
Q. Was Morrissey's group one of them?
A. Yes, he and his wife, his Trotskyite wife is one of them."

another "upstart" and would be put in its place and shown (at Exhibit 7, p. 616A):

> "Q. Mr. Curran, did you report * * * at the National Convention that you would see to it that these payments (pension payments which the Court had held were wrongfully made to non-officers) would be made *whatever the court might rule?*
>
> Mr. Epstein: That is objected to, if Your Honor please, we are going back . . .
>
> The Court: I would be interested whether he said that. Did you say that?
>
> The Witness: I said that, Your Honor." (Parenthetical material and emphasis added.)

There was, in the long run, even the threat that Morrissey by the election process, might overturn the management and replace them.*

Curran's control of *The Pilot* was not enough. Morrissey must be quieted. The Department of Labor suggested Morrissey be given space in *The Pilot*. But Curran "warned that if the government decided that they (Morrissey and his group) would be given access to *The Pilot* we would not print *The Pilot* . . ." (817E). So when Morrissey started passing out his literature (145A) on or about May 14, 1971 (122A) a Notice was placed in the Union Hall reading:

> **"NOTICE**
>
> "It is the established policy of the National Maritime Union that only official union publications may be distributed inside the hiring hall or other union offices. No solicitation is permitted inside any union buildings. Any persons attempting to solicit sales or distribute unauthorized literature inside NMU bui[illegible]

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* He had run creditable races before (see 94A and 103A).

> ings will be asked to discontinue such practice and, in the event they fail to comply with such request will be required to leave the premises.
>
> s/ Shannon J. Wall''

This Notice did not reflect union policy (145A) and had not been promulgated as required by the NMU constitution (see *infra*, p. 19) but something had to be done and fast. Perhaps Morrissey could be intimidated by this Notice. And if the Notice should prove ineffective, Morrissey must be silenced—embarrassed by an arrest and prosecution.

The consequences which flowed not only maliciously deprived Morrissey of his right to speak, guaranteed by Title 29 U.S.C. § 411, LMRDA (Title I) under § 101 but also maliciously infringed upon Morrissey's right to be left alone and upon his right to freedom from arrest and prosecution.

Morrissey brought this action for redress. The jury, under a fair and proper charge, found the verdicts upon which the judgments, under appeal, were entered.

POINT I

Curran is primarily responsible for the indignity heaped on James Morrissey.

For some time Morrissey had been a thorn in Curran's side. Litigation under LMRDA commenced by the Secretary of Labor at Morrissey's instigation had successfully resulted in overturning the 1966 NMU election (105A and 300A). Litigation under LMRDA was commenced and prosecuted by the United States Attorney's office at Morrissey's instigation which resulted in Morrissey's reinstatement to membership in NMU after his union book had been unlawfully lifted* (114-115A; 301-303A). Litigation

* On that occasion it took 18 months to secure the return of Morrissey's union book.

under LMRDA commenced and prosecuted by Morrissey had seriously impaired Curran's power over the vast slush fund built up as the OPEIU (Exhibit 7) and was threatening to go further in that direction. He was jealous of these prerogatives, of the power which comes with the misuse of union funds and control that this gave over his henchmen. He vented his spleen in *The Pilot*, thus (744E):

> "But under Landrum-Griffin it seems that a new set of rules apply. People who put themselves in the position of attacking their Union achieve some kind of special status and are handled differently. They can bring the flimsiest of evidence to judges who are totally incompetent to judge that evidence and an action is likely to be handed down against the union."

Curran could not countenance such interference. Not only that, but Morrissey was actually threatening to replace Curran by the election process. All of this had engendered in Curran's heart, an abiding hatred for Morrissey, manifested by his many utterances in *The Pilot* and elsewhere.

So when Morrissey sought to get his word across to NMU members in the only feasible way, that was too much. Curran had *The Pilot*. That could be, and was, the only literature distributed in the Union hall (471A) and to members aboard all the ships. Nothing could go in *The Pilot* without Curran's approval. Unless he could be answered by similar means there was a serious threat that his stranglehold on the union would be perpetuated.

The inference is compelling, that Wall and Snow would not have dared to take this action if contrary to Curran's wishes and intents. And knowing his wishes and intents, they dared do nothing less. Wherein consider Karchmer's statement. " 'Well, to go into Joe is a very fearful process' " (*supra*).

When Henry II exclaimed in exasperation—"will not some one avenge me of this upstart cleric", his men took

King Henry at his word and murdered Thomas A. Becket. Henry was punished, just as the jury here has punished Curran. In both cases, sanctions were justified.

The fact that Curran was called from the union office on the eve of Morrissey's arrest,* attests to Curran's men having sought confirmation of what they understood his wishes to be. Had he not sneered at "these dissidents" (meaning Morrissey); had not characterized Morrissey and his ilk "lower than scum".

Now here was this "upstart" sailor claiming a right to violate Curran's order that only official literature could be distributed in the union hall. This was too much—make the arrest and let the chips fall where they may.

Moreover, Snow made a written report concerning the whole affair. That report was suppressed by the defendants (480-482A; SA4-SA6).

The tale of the suppressed report is one which should be of particular interest to this Court on these appeals for, we think, it illustrates, for one thing, the unmitigated gall of the defendants.

During the pre-trial discovery the defendants on March 13, 1973, represented that they had no records relating to

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* Shocking as it may seem, Curran has now attacked the admissibility of those telephone calls (his brief, p. 24). He argues: "the court below, in violation of the most basic principles of evidence, admitted evidence of telephone calls." The fact is the defendants' counsel stipulated to their admission (407-409A). The stipulation read to the jury by the Court was in part (408-409A) "Ladies and gentlemen, counsel have stipulated that on June 30, 1971 and again on July 20 1971 a total of three telephone calls were made from the National Maritime Union telephone number in New York to the residence of Mr. Joseph Curran in Florida. There was one call made from the National Maritime Union number on June 30 and there were two telephone calls made on July 20 for a total of three telephone calls. You may accept that stipulation as agreed.

Further than that Curran, himself, introduced the telephone records into evidence (Exhibit A, 415A).

And *now* he has the audacity to complain about their admission.

Morrissey except certain records then produced (SA4). The dossier which the defendants kept on Morrissey (Exhibit 24 in evidence, 822-831E) was not produced at that time.

The defendants were also asked to produce at that time, March 13, 1973, "all memoranda relating to the facts concerning the arrest of James Morrissey on July 1, 1971 at 36 Seventh Avenue, New York, New York. The Snow memorandum regarding Morrissey's arrest (480A) was not produced (SA4).

Mr. Snow's deposition was taken in two sessions (SA4-5). On the second session of that deposition (Sept. 6, 1974) Mr. Snow finally testified that he kept a file on Morrissey and "that arrest was certainly on record if nothing else" (480A).

The Snow file, despite repeated requests, was not delivered to Plaintiff's counsel until the week preceding the trial (443A). When it was delivered—a most remarkable omission of evidence was discovered—the Snow memorandum was gone (SA4).

The excuse that the records were lost when the Union moved—"seven times"—(SA5) could not have explained their non production in March, 1973. Since the Union only moved once on October 30, 1973 (SA5). Moreover, it did not explain the failure to produce the entire file at the trial.*

The jury had every right to draw the inference that the report, if produced, would have been damaging to

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* There is reason to believe that the Morrissey file contained the full account of Morrissey's mugging outside the Union hall (SA5). Had that material been produced, plaintiff would have been in a position to call Dr. Messer who would have testified to the facts contained in his report (SA8) and the Luccio article which Mr. Curran testified was a "special article" (489A). That article was excluded in the present state of the record (SA5-6; Exhibit 18 for identification only; 807-808E). That article should have been admitted, we think, on the issue of malice.

each of the defendants. That inference was more than justified. In fact, it is compelling, for it is well settled that the intentional destruction of relevant written evidence gives rise to the inference that the matter destroyed is unfavorable to the spoliator. *Matter of Eno,* 196 App. Div. 131, 163 (First Dept., 1921).

But even after the arrest, Curran had a *locus poenitentiae* during which he could have mitigated damages by ordering the complaint withdrawn.

What did he do?

He sent union counsel to cement the charges (277A; 772-775E; 755E; 272A) to insure that Morrissey would be incarcerated.

POINT II

Whether or not the NMU authorized Morrissey's arrest and prosecution has no bearing on Curran's liability.

The Curran brief (p. 6) advances the novel theory that a wrongful act perpetrated by a union officer will carry no sanctions if authorized by the union. In other words, that an employee can deliberately act without fear of consequences to himself when his act has been ordered by his employer. That argument calls to mind the defenses advanced at the Nuremberg trials. It did not prevail there and cannot prevail here.

The authorities offered to support this proposition do not hold water. In none of those cases (Curran brief, p. 6) was there a finding that the defendants had acted with malice.

In fact in *White* v. *King,* 319 F. Supp. 122 (E.D. La. 1970), the first case Mr. Curran refers to (at his brief p. 6) District Judge Heeke took pains to say at p. 126:

> "Throughout this course of events and in taking these various actions regarding plaintiffs, the evi-

> dence showed and this Court finds that defendant officers were not activated by malice but were instead attemping in good faith to discharge their duties under the local's by-laws and constitution."

Similarly, in *Nix* v. *Fulton Lodge*, 262 F. Supp. 1000, 1008 (N.D. Ga., 1967) aff'd in part, vacated in part, 415 F. 2d 212 (5th Cir., 1969) there was no indication of malice on Miller's part.

And in *Gulickson* v. *Forest*, 290 F. Supp. 457 (Curran brief, p. 6) there was not even a violation of the LMRDA.

Indeed, it is rather strange to hear the defendants make this argument and at the same time argue that the union is not liable because (as they claim contrary to fact) the union, as such, neither authorized the violation of Landrum-Griffin, the arrest and prosecution, nor ratified such acts. Curran would have his cake and eat it too—NMU, is not liable because, as he says, the union did not order the act and Curran is not liable because he acted within his authority as a union officer.

This argument falls of its own weight.

When the rights of individual union members have been maliciously interfered with by the union, its officials or its agents, civil redress can be had against them. See *Eisman* v. *Baltimore Regional*, 496 F.2d 1313 (4th Cir. 1974) (Boreman, Butzner and Russell), at page 1314. That Court affirmed the district court's holding that a trial should be had on four issues, one of which was whether two of the officers were "* * * acting under color of and in abuse of their respective union offices," when they "caused the wrongful expulsion of plaintiff * * *."

The other issues approved by the Court of Appeals were:

> "(2) whether plaintiff suffered any injury which was the proximate result of his wrongful expulsion; (3) the assessment of the amount of compensatory

damages to compensate for any such injury; and (4) the assessment of punitive damages if otherwise appropriate."

See also to the same effect *Sipe* v. *Local Union No. 191 Carpenters and Joiners*, 393 F. Supp. 865, at page 872 (*infra*, p. 32).

POINT III

This Court must view the evidence in the light most favorable to the plaintiff.

The briefs submitted by defendant-appellant on this appeal are of little aid to this Court because they have presented the matter in the "light most favorable" to them.

This Court has recently said in *King* v. *Deutsche Dampfs-Ges*, 523 F.2d 1042 (1975) (Timbers C.J.) at p. 1044:

> "In determining whether the motion for a directed verdict should have been granted as Appellants claim it is axiomatic that the evidence must be viewed in the light most favorable to the party against whom the motion was made." *Bigelow* v. *Agway, Inc.*, 506 F. 2d 551, 554 (2nd Cir. 1974), *O'Connor* v. *Pennsylvania R.R. Co.*, 308 F.2d 911, 914-15 (2nd Cir. 1962)."

and at p. 1045:

> "On appeal we are no more free than the district court to ignore evidence favorable to plaintiff or 'to set aside the jury verdict merely because the jury could have drawn different inferences . . .' *Tenant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944); *Sentilles* v. *Inter-Carribbean Corp.*, 361 U.S. 107, 109-10 (1959). Our review is limited to determining whether there was substantial evidence to support the verdict * * *."

POINT IV

The violations of Morrissey's rights under the Landrum-Griffin Act and his subsequent prosecution gave rise to two grievances.

As shown above in Point I, there were sufficient facts proven to warrant an inference that not only did Curran sanction the arrest which was one the acts constituting the statutory violation of Section 411 (713A) but also sanctioned the common law tort of malicious prosecution itself (713A). The jury concluded that Curran had responsibility on each. The evidence amply justified this conclusion.

The first cause of action was for damages for the infringement of the plaintiff's rights under the Landrum-Griffin Act. That cause was based upon acts which occurred in the Union Hall on July 1st and prior thereto. That cause matured then. The damages suffered by the plaintiff for these acts matured then.

As District Judge Smith said in *Nix* v. *Fulton Lodge*, 262 F. Supp. 1000 (*supra*, p. 11) at p. 1005:

> "It is apparent to the court that the free speech provisions of the Act are extremely broad. It has been stated that this right of freedom of speech is absolute and is limited only by the two congressional exceptions of reserving to the unions power to enforce reasonable rules (1) as to the responsibility of members toward the organization of an institution and (2) to prevent interference with the union's contractual and legal obligations. 29 U.S.C.A. § 411(a) (2); Salzhandler v. Caputo, 316 F.2d 445 (2nd Cir. 1963), cert. den. 375 F.2d 946, 84 S.Ct. 344, 11 L.Ed. 2d 275. It has followed that a liberal interpretation has been given the provisions by the courts and as long as the exercise of speech is related to union activities

> it has been held sufficient to satisfy this threshold requirement for judicial action."

and further on the same page:

> " 'The clear intent of Congress in enacting [the Labor-Management Reporting and Disclosure Act] was to prevent union officials from using their disciplinary powers to silence criticism and punish those who dare to question and complain.' Graham v. Soloner, supra."

There was no doubt that the limitation of Morrissey's right to express his views in the Union hall was established by a fair preponderance of the credible evidence (710A).

In addition, the evidence that Morrissey (1) had not been presented with written specific charges; (2) had not been given a reasonable time to prepare his defense and (3) had not been afforded any hearing (199-200A), was not disputed.

The second cause of action—malicious prosecution was based upon acts which occurred outside the Union Hall. These acts commenced when the complaint was filed and continued through the prosecution of that complaint to the trial and discharge of the plaintiff (712A).

There was no doubt that Morrissey's right to be left alone and not be criminally prosecuted had been violated. That too was established by a fair preponderance of the credible evidence.

The jury was properly instructed that they could return verdicts on each cause of action.

The jury was exceptionally astute and conscientious.* During their deliberation, they sent a note to the Court

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* See for example, the note submitted by the jury foreman after trial (839-840E).

reading (635-636A; 646A):

> "The jury would like to know whether it has any power to allocate damages, if any, among the various defendants against whom judgment is rendered or is allocation automatic and equally apportioned?"

In response, and with no objection or exception from either party, the Court charged (646-647A):

> "The jury should not make any apportionment of compensatory damages if any compensatory damages are awarded, and those would be the damages, if any, which you might award in response to question four and question nine.
>
> "However, if you decide to award punitive damages against any defendant which would be in response to five and ten (five being the special verdict question number 5, and ten being the special verdict question number 10) you may allocate the particular portions of that award among the defendant or defendants who you find to have acted in a manner which would give rise to an award of punitive damages" (words in parentheses supplied).
>
> "So, Mr. Foreman, you may for a 5-A and a 10-A, wish if punitive damages are awarded to note the name of the defendants, if any, against whom such an award is made, and the respective separate amounts, if any of the awards which you wish to make against those defendants. That would be the awards, if any, made under question 5 and question 10."

Thus stated, no doubt could have been left in the minds of the jurors that they were required to return separate verdicts on each cause of action; one for acts done in the Union Hall; and one for acts done in the criminal court; and that they could allocate punitive damages for each offense according to the defendants' respective culpability.

And that is exactly what the jury proceeded to do. Moreover, they did this in a way that clearly shows an intention to make the damages cumulative and not duplicative.

The $220,000 awarded under the Landrum-Griffin Act were apportioned $50,000 (or 5/22nds) to NMU, $100,000 (or 10/22nds) to Joseph Curran, $60,000 (or 6/22nds) to Shannon J. Wall, and $10,000 (or 1/22nd to Charles Snow.

On the other hand, the $110,000 awarded under the common law cause of action were apportioned $50,000 (or 10/22nds) to NMU, $25,000 (or 5/22nds) to Joseph Curran, $15,000 (or 3/22nds) to Shannon J. Wall, and $20,000 (or 4/22nds) to Charles Snow.

In other words, the jury dealt differently with the two punitive damages awards for each defendant. The formulae for allocation will not mix. The awards are not fungible. They are not capable of mutual substitution.

POINT V

The defendants' exceptions to the charge of the District Court were not nearly as broad as their appeals.

The charge was concise and clear (604-630A; 646-647A; 652-653A). The special verdict form was prepared and submitted with the consent of both counsel (566A). This form required the jury to find the damages, compensatory and punitive, to be assessed on the first cause of action and the damages, compensatory and punitive, to be assessed on the second cause of action. The jury was told that "you may not compound or duplicate the damages from one cause of action to another" (627A and 714A).

In the first place, the charge was unobjectionable. In the second place, even if it had been error, the charge, given without objection, became the law of the case when the jury

retired to consider its verdict. Rule 51 of the Federal Rules of Civil Procedure provides:

> "Rule 51. Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The objections made and the full colloquy were (630-632A):

> "We would take exception to that portion of the charge which has charged the jury that the notice was not legitimately promulgated on the grounds that that would be a question of fact for the jury and not a matter of law.
>
> "The Court: I thought the record was so clear on that. I think I used the word duly or some similar word. I don't remember the word legitimately.
>
> "Mr. Mina: So the Court understands my reason for it, we are taking the position that this rule is one that was instituted in New York because of the problem. It was not a national rule and, therefore, not required to be duly promulgated through the national office.
>
> "The Court: You have your exception on that. Any other exceptions?
>
> "Mr. Mina: Yes, your Honor.

"On the charge regarding Section 411(a)(5) only because we take the position as we did on the motions that this case has no applicability to that section. It is not a suspension or an infringement as contemplated by the Landrum-Griffin Act.

"The Court: Of course, we go on with the words disciplining and others.

"Mr. Mina: Yes, your Honor.

"The Court: You have your exception. Are there any other exceptions?

"Mr. Mina: Yes, your Honor.

"As regards damages, we except to that portion of the charge which allows the plaintiff damages for loss of reputation. If that existed, we respectfully take the position that his remedy would have been a suit for defamation.

"The Court: You have your exception. Are there any other exceptions?

"Mr. Mina: No, your Honor.

"The Court: Are there any requests for supplementary instructions from the plaintiff?

"Mr. McInerney: No, your Honor

"Mr. Mina: We would only ask that the Court incorporate our request to charge as requests and, therefore, take exception to any—

"The Court: To any portions of the requests which you submitted which were not charged in haec verba.

"Mr. Mina: Yes, your Honor.

"The Court: Very well. Anything else, gentlemen?

"Mr. McInerney: No, your Honor.

"Mr. Mina: Nothing else, your Honor.

Now on appeal, the defendants have raised a myriad of issues not presented below. (See for example Points II [pp. 15-17], IV and V of the Core brief.)

But even more startling is the claim on one of the three exceptions taken (Core brief, p. 19) that the trial judge

erred when he instructed the jury that the notice was not duly promulgated. It would appear that that point was conceded below when defendant's trial counsel said, (*supra*):

> "It was not a national rule and therefore, not required to be duly promulgated through the national office."

There was nothing in this record to differentiate between a national rule or local rule. Moreover, (per contra the Core brief, pp. 20-21) it was not the union policy (145A and 396A) and there was no evidence that the Notice was the result of National Office action as required by the NMU Constitution (832E, Exhibit 25, Article 8, Section 2(b), p. 32 and Section 7, p. 33). There was in fact, evidence that it had not been (397A).

Since the defendants have admitted once again that there was no membership ratification (Core brief, p. 20) it is difficult to understand how they can claim with a straight face that the rule was "duly promulgated."

The only other evidence (832E) is contained in Exhibit 25, the NMU Constitution, Article 8, Section 10:

> "As the official organ of the Union the Pilot shall be the medium through which all notices and communications shall be brought to the attention of members of the Union."

and Mr. Wall's testimony on the subject (386-388A). He did not know when the undated notice was signed (386-387A) or posted in the halls. But he did know that it had not been published in *The Pilot* (398-399A).

The record on this issue was so clear that as Judge Medina said in *Reynolds* v. *Pegler* (*infra* p. 27) at page 434:

> "The trial judge would have been remiss in his duty had he submitted this issue to the jury."

And on top of all this—and more startling yet—is the defendant's claim (Core brief, p. 16) that

> "The court below erred in refusing to submit to the jury the question of whether the rule prohibiting the distribution of literature was a 'reasonable rule relating to the union's performance of its legal or contractual obligations.'"

The reason it is difficult to comprehend this claim is that the court below charged the jury (614-615A):

> "The law gives a union the right to make reasonable rules.
>
> * * *
>
> "If you find that on July 1st, 1971 plaintiff's activities created an immediate danger of seriously interfering with the union's functioning, you may find that prohibiting those activities was reasonable.
>
> "On the other hand, if you find that on July 1, 1971 plaintiff's activities did not create an immediate danger of seriously interfering with the union's functioning, you may find that prohibiting those activities was not reasonable."

POINT VI

The denial of the application for adjournment was not an abuse of discretion.

The attorney for Curran stated that he learned on Wednesday, April 9th, 1975, that Mr. Curran was scheduled to go into the hospital on April 14th. But, plaintiff's counsel was not advised of this. Plaintiff's counsel was allowed to proceed with last minute trial preparations, the issue and service of subpoenas, the many other details required for a jury trial, and the recall of his paralegal from Pennsylvania. She was the one who had assisted in the pre-trial proceedings. There was never a suggestion to plaintiff's counsel that Curran would not be ready for trial

until the case was called on the morning of April 14th (28A). The plaintiff had to get off his ship for the trial—and under the shipping rules that meant that he could not re-ship for five weeks (28A).

Some of the arrogance displayed by Mr. Curran was imparted to his trial counsel. It would have been a matter of simple courtesy to advise plaintiff's counsel of the problem on April 9th. No such courtesy was extended (28A).

Indeed, it is more than a strange coincidence that Curran was scheduled to go to the hospital on the very day set for trial. Considering the character of this man, as disclosed by his deposition and other evidence, very little imagination is required to see that that day had been selected for the single purpose of frustrating the trial. If the trial had been postponed, another excuse would have been found on the adjourned date.*

The application for the postponement was addressed to the discretion of the District Court. Yet, nothing was presented, by way of affidavits or doctor's certificate, upon the basis of which discretion might be fairly exercised. The District Court had no alternative. Under the circumstances, a granting of the application would have been an abuse of discretion. It would not be fair, either to the District Court or to the plaintiff, to allow *ex post facto* evidence (presented for the first time after the trial had been completed and a verdict rendered) as a basis for a determination that the District Court abused its discretion on April 14th. The determination made then should stand or fall on the evidence presented then.

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* Plaintiff would have preferred to have had both Curran and Snow at the trial. Snow was served with a subpoena to testify at the trial. But that subpoena was disregarded (because it was claimed that he was too ill to appear) and plaintiff had to be content with reading that deposition as well. That deprived the plaintiff of the opportunity to cross examine Mr. Snow on Exhibit 24 (823E) and to establish in the jury's presence just what had been removed. (See *supra*, pp. 8-10.)

Significantly no offer of proof was made as to what Curran would say differently—or what he would add.

Even more significantly, Mr. Curran was not ailing too badly. He, himself, told *The Pilot* (699-700A) "It was just a scraping".

But the District Court was jealous of the protection of the defendants and went so far as to tell the jury (78A):

> "If Mr. Curran is not here, I am sure it will be for good and sufficient reason. You shouldn't presume anything against him because he is not here. You should take whatever is presented from him in the form of testimony just the same as if he were here."

Then the District Court instructed the jury in his charge (612A):

> "I instruct you that you are not to draw any inference for or against any party because of the absence of Mr. Curran and Mr. Snow."

The plaintiff did not comment on Curran's absence either in his opening or in his summation—which under ordinary circumstances would have been unobjectionable. See *United States* v. *Certain Land in City of Fort Worth, Texas,* 414 F. 1026, 1028 (5th Cir., 1969); See also *Lamb* v. *Globe Seaways Inc.,* 516 F. 2d 1352 (2nd Cir., 1975) *infra,* p. 23.

An analogous situation existed in *Davis* v. *United Fruit Co.* (CA 2) 402 F. 2d 328. There, the plaintiff was a seaman and was at sea on the date of trial and accordingly unavailable. An application was made for a five day postponement. However, the defendant had taken Davis' deposition before trial and the transcript of that deposition was available for use by either party. In the exercise of its discretion, the District Court denied the application to adjourn the trial date. This Court affirmed. Kauf-

man, C.J. said at pages 329, 330:

> "It is important to note that we are not dealing with a case which had been dismissed without affording the litigant a decision on the merits. Here, counsel proceeded to trial and made use of Davis' deposition taken by the defendant. It was read to the jury and the ships records, injury report and medical log were available to Davis' counsel to support his claim."

In *Lamb* v. *Globe Seaways, Inc.* (*supra*), Circuit Judge Medina said at p. 1353:

> "We are all agreed that the denial of the motion for a continuance was not an abuse of the trial judge's discretion. All the parties knew of the possibility that Lamb might be absent and the trial judge had provided an alternative method of perpetuating Lamb's testimony for use at the trial. This Circuit has consistently upheld the practice of denying trial continuances in cases in which a party or a witness was absent from the trial. See, Davis v. United Fruit Company, 402 F.2d 328 (1968), cert. denied, 393 U.S. 1085, 89 S.Ct. 869, 21 L.Ed.2d 777 (1969). See, also, Michelsen v. Moore-McCormack Lines, Inc., 429 F.2d 394 (1970); Sacharow v. Vogel, 428 F.2d 1389 (1970); Winston v. Prudential Lines, Inc., 415 F.2d 619 (1969) cert. denied, 397 U.S. 918, 90 S.Ct. 926, 25 L.Ed.2d 99 (1970); Vitarelle v. Long Island Rail Road Company, 415 F.2d 302 (1969). This line of cases is applicable *a fortiori* to situations arising since the establishment of the new assignment system in the Southern District of New York on July 1, 1972, by which substantial numbers of particular cases are assigned to each of the trial judges and each judge is given what virtually amounts to complete control of his calendar in these cases. He passes upon all the motions, he supervises all the dis-

> covery and pre-trial proceedings and he decides when the cases are to be tried."

The difficulty with *Gaspar* v. *Kassm,* (CA 3) 493 F.2d 964, is that the deposition which had been used in lieu of Kassm's physical appearance had been taken in an action between Kassm and a different party, in an action which involved different issues and in an action where the parties, including Kassm were represented by different attorneys. Also in *Gaspar* v. *Kassm,* the plaintiff's attorney had been given ample notice of the problem twelve days before the date set for trial.

In *Cornwell* v. *Cornwell* (C.A.D.C.) 118 F.2d 396, for all that appears, the case was submitted without the defendant's testimony in any form. That was what happened in *Latham* v. *Croftus, Inc.,* 492 F.2d 913 (4th Cir., 1974), as well.

In *Davis* v. *United Fruit Co., supra,* Judge Kaufman referring to appellant's counsel said at page 330:

> "He should either have taken Davis' deposition in order to have his testimony ready in the event his client was not available for the trial, Fed. R. Civ. p. 26 and 27, or have used the occasion of the defendant's examination of Davis to ask questions helpful to his client's cause."

Here, the Curran deposition was taken "on the issues in this action". The same attorneys voluntarily selected by Curran (Minna, Madison, Sovel and Gruber) were present and offered an opportunity to address questions to Curran. Since Curran resided in Florida, over a thousand miles from the place of trial, their failure to avail themselves of this opportunity could only mean that they felt that further questions to Mr. Curran would only aggravate and be of no help.

Also, in multiple party litigation, such difficulties should always be anticipated. It is a certainty that if Mr. Curran had succeeded in obtaining a postponement, plaintiff would have encountered the same ploy later—if not with Curran —then with Snow.

Fortunately, Curran's deposition had been taken and was properly allowed to play a large part by the District Court in the exercising of its discretion.

The deposition was an effective substitute for Curran's presence

This deposition was taken commencing on December 14, 1973 and continuing on April 30, 1974. It had been noticed to be taken "upon the issues in this action". The notice placed no other limitations or restrictions on the matters that would or could be made the subject of inquiry at the deposition.

Mr. Minna as well as Mr. Freedman appeared on the taking of the deposition representing the defendants; NMU, Curran, Wall and Snow. They were invited to examine. They had an opportunity to do so. It is small wonder that they elected not to examine, in view of the animosity which Mr. Curran had displayed toward the plaintiff. Further inquiry would simply have added fuel to the fire. And that can also be said about any testimony which Mr. Curran might have given had he been present at the trial. In fact, it would have been good trial strategy on the part of his counsel not to call Curran as a witness under any circumstances. They elected not to call Mr. Snow, who was present in New York, obviously for similar reasons. (*See supra* p. 21). Any lack of participation by Mr. Curran in the ejection and arrest, if a fact, could have been supplied by other witnesses—Snow, Wall, Sovel, Nimmo, or Freedman. No effort was made to do this.

POINT VII

The District Court was correct when it refused to permit the defendants to attempt to impeach their witness by the use of collateral matter.

Defendants called Ralph Ibrahim to testify on their behalf (535A). In so doing they were vouching for his credibility. Now they are attempting to make heavy weather of the fact that he did not tell the story they wished to hear. Their attempts to impeach him by the introduction of collateral matter (541-542A) failed—and rightly so. The letter he wrote after all the criminal charges against Morrissey had been dismissed (833E) did nothing more than reiterate the story already told in different words: Morrissey had refused to kow-tow to the Curran forces. His justifiable obstinacy resulted in his arrest and prosecution. Had he bowed down in contrite submission, he would have escaped the ordeal and Curran and his henchmen would have accomplished their end.

Moreover, defendants were not surprised by this Ibrahim letter. It was mailed to Curran. They had not forgotten it. They questioned Morrissey about it at his deposition (550A) but refused to confront him with it at the trial despite the District Court's express invitation to do so (549A). Ibrahim testified he never spoke to Mr. Morrissey about either the letter or its contents (541A and 553-554A).

The defendants' claim that Mrs. Morrissey "absented herself from the courtroom" is specious. (Core brief, p. 40). The sagacious counsel employed by the defendants had means to compel Mrs. Morrissey's attendance—if he really wished to call her. But he never intended to do so. He did not so much as request her presence.

Interestingly enough, despite a vigorous examination by defendants' counsel on these collateral matters, Mr.

Ibrahim was never asked how he acquired knowledge of Morrissey's arrest and prosecution. He was not asked if he witnessed the event on July 1, 1971. Nor was he asked whether or not he attended the proceedings in the Criminal Courts. Had he been asked those questions his answers would have been in the affirmative.

In short, Mr. Ibrahim's conclusions contained in his letter (833A) added nothing to what was already in evidence. As Judge Medina said in *Reynolds* v. *Pegler*, 223 F.2d 429, 435 (*infra*)

> "The trial judge was justified, in the exercise of his discretion, in excluding matters of such doubtful evidentiary value in order to avoid the confusion, delay and prejudice which would, in all probability, attended their admission."

POINT VIII

The verdict finding malice and the quantum of punitive damages should not be disturbed.

Malice is a fact peculiarly within the province of a jury as this court recognized in *Reynolds* v. *Pegler*, 223 F.2d 429, *cert. denied* 350 U.S. 846. In that case this court said at p. 431:

> "Moreover, in the absence of some indication of passion or prejudice, the amount of punitive damages to be awarded is an issue peculiarly within the province of a jury to decide. It is not our function to calculate what any or all of the defendants should be required to pay by way of punishment and in order to deter them from repeating the offense, but only to review the rulings by the trial judge, which are said to constitute reversible error, as he applied the proper standards in passing upon the motion to set aside the verdict and for a new trial, we cannot find any abuse

of discretion, and we should be required to reach the same conclusion, even if we thought the verdict excessive."

Malice is a state of mind and, short of an explicit admission, can only be drawn as an inference from the whole body of relevant facts.

It may be inferred from prior expression of ill will; it may be inferred from lack of probable cause; it may be inferred from prior lawful acts of the plaintiff which had been irksome to the defendants (54 C.J.S. 1092-1093). That the defendants may have had advice of counsel does not remove the issue from the province of the jury. The jury may still consider whether or not the advice sought was unbiased and unprejudiced (the attorney here was Curran appointee)* or whether all relevant facts had been communicated to the attorney whose advice was sought. In other words, the jury's finding is final in spite of such advice. (54 C.J.S. 1093-1095)

Here the jury knew that Curran was consumed by his hatred toward Morrissey; that such hatred was so fearful that the others involved dared not counter Curran's wishes; that through Morrissey's pending action, Snow had been kicked out of the lush OPF (450-451A) and that Curran and Wall were still under the threat, through Morrissey's pending suit, of a judgment in a substantial amount for having countenanced the overfunding of the OPF and permitting substantial payments out of that fund to persons not entitled to participate in it (399-400A)|

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* It should also be noted that the advice was sought from Abraham E. Freedman (and his partners Charles Sovel and Stanley Gruber) the attorney who himself was a defendant in the Morrissey suit under LMRDA; who himself was in severe jeopardy at the time of Morrissey's arrest and who was ultimately held liable for his "reckless indifference to his duties" and cast in judgment for the sum of $272,740.50. We suggest that his advice was tainted. And that these defendants knew that it was tainted. At least, the jury was justified in drawing such inference.

It was for the jury—not the Court—to determine whether or not malice should be inferred. The jury found malice. That finding should not be disturbed.

As further and convincing evidence of malice, the defendants have gratuitously thrown in an old misdeed of Morrissey's, a misdeed committed in his youth, almost forty years ago and which he had, by his subsequent good conduct and right living, long since lived down and from which he had received a full pardon (738E).

In their insolence, they published a flyer (813E) entitled "**Who Will Lead NMU?**" and subtitled "**A 'convicted felon'?**" "**A 'dangerous paranoid'?**" The body of that flyer read, in part:

> "We don't like to spread before the public such facts about one man's criminal record * * *. But under the circumstances we have to. Morrissey wants to be National Secretary-Treasurer of NMU * * * You have to know what kind of people want to take over our union. The NMU pension funds, contract negotiations, contract enforcement, the whole future of NMU and all it means to you will be in the hands of the officials you elect. Don't take chances. * * *"

Moreover, the defendants conceded at the trial that malice "certainly can be inferred from lack of probable cause" (510A).

This jury, as astute and careful as it was, knew it was dealing with defendants who weilded enormous power and had vast resources at their disposal. It recognized the dictatorial manner in which they handled union affairs. The jury knew that a "slap on the wrist" would have been ineffective. Anything less than punishing damages would roll from them like water off a duck's back. It knew that a small verdict would have encouraged them in their pursuit. It knew that the verdicts entered against each had to "smart" the offenders—to punish them and to deter

them and others in similar power from such behavior in the future.

To one who heard the evidence, to one who reads the record, the verdicts do not shock the conscience. Small verdicts if rendered would have been shocking. Small verdicts would not have deterred these fellows. The verdicts as rendered, might. Even so, the tax aspects of the matter will take out a lot of the sting. Punitive damages are taxable as income to a plaintiff, *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S., 426 (1955), and are a tax deduction for the defendants.

The trial court had the benefit of hearing the testimony and observing the demeanor of the witnesses and it knows the community and its standards. It would necessarily be in a better position to evaluate whether or not a verdict is "monstrous", or "shocking".*

It has been over twenty years since Quentin Reynolds presented his grievance to a jury in the same district court. That jury punished the defendants for their evil acts. The verdict was not unsupported by the evidence and was upheld. In *Reynolds* v. *Pegler* (S.D.N.Y.), 123 F.Supp. 36 aff'd 223 F.2d 429 (2nd Cir.) *cert. denied* 350 U.S. 846 (1955) it appeared that the jury had awarded punitive damages in an amount equal to 175,000 times the amount of compensatory damages. Judge Weinfeld denied a motion to set the verdict aside saying at pages 41-42:

> "Indeed, the individual assessment of punitive damages against each defendant reflects the exercise of a carefully considered judgment by the jury. . . ."
>
> "The evidence in the case warranted a finding by the jury that the nature and extent of malicious conduct

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* Assuming the appellate power to review the quantum of punitive damages to exist under the Seventh Amendment the action of the trial court in ruling on the motion cannot be disturbed by the appellate court where the trial court's action has support in the record. *Neese* v. *Southern Railroad Company*, 350 U.S. 77.

> of each defendant differed—that in the case of the individual defendant there was actual malice, ill-will and spite, and in the instance of the corporate defendants wanton or reckless indifference of plaintiff's rights. In discriminating in the awards imposed against each defendant, the jury followed the Court's instructions that the issue of punitive damages had to be considered separately as to each. The verdict of the jury not only finds support in the evidence, but is consonant with the objectives of punitive damages. If the purpose of punitive damages is to punish and to act as a deterrent, a verdict which is not in such sum as to make itself felt upon an offender defeats that purpose. Unless it is of sufficient substance to 'smart', the offender in effect purchases a right to libel another for a price which may have little or no effect upon him. Indeed, in such a situation a defendant, instead of being deterred from a repetition of his offense, may be encouraged to renew his assault."

Criminality has never been regarded as a necessary ingredient of a right to punitive damages. The elements of the right are stated in the disjunctive—see 25 C.J.S. Section 123(1), 1133-34:

> "They are recoverable for an area of tortious conduct more culpable than negligence, but falling short of intentional conduct and, in general, are allowed in a proper case when the wrongful act or the conduct complained of is accompanied or attended by certain aggravating circumstances such as malice, wantonness, willfulness, oppression, gross negligence, or fraud and only when such aggravating circumstances accompany the wrongful act or conduct."

In *International Brotherhood of Boilermakers* v. *Braswell* (C.A. 5) 388 F.2d 193, Wisdom, C.J. said at page 200:

> "In the statutory statement of findings and purposes of LMRDA Congress declares that there are

> instances of unions' 'disregard of the rights of individual employees' and that it 'is neces[illegible] to eliminate or prevent improper practices on the part of labor organizations * * *'
>
> "29 U.S.C. Section 401. The awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent."

See also to the same effect, *Farowitz* v. *Associated Musicians etc.* (Levet, D.J.) (S.D.N.Y. 1965), 241 F. Supp. 895, 909, aff'd 330 F.2d 999 (Lumbard, Waterman and Friendly, C.J.).

If the damages under the Landrum-Griffin Act were limited just to actual damages Mr. Curran would have Morrissey thrown on the street every day of the week. He would be happy to pay that amount for the privilege of silencing his opposition. That would emasculate the salutory effect of the Act. That was not what Congress intended.

In *Sipe* v. *Local Union No. 191 Carpenters and Joiners*, 391 F. Supp. 865 (M.D. Pa. 1975) Chief Judge Sheridan said at pp. 871-872:

> "There is some authority that punitive damages are not allowable in this type of action. Magelssen v. Local 518, Operative Plasterers, W.D.Mo. 1965, 240 F.Supp. 259 (alternative holding); Burris v. International Bhd. of Teamsters, D.N.C.1963, 224 F.Supp. 277. However, '[t]he better reasoned cases would permit such a recovery on the theory that the award of exemplary damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent.' Sands v. Abelli, S.D.N.Y.1968, 290 F.Supp. 677 (footnote omitted). Accordingly, courts allow punitive damages where there is 'actual malice or wreckless [sic] or wanton indifference to the rights of the plaintiff.' International Bhd. of Boilermakers

v. Braswell, 5 Cir. 1968, 388 F.2d 193, 199, cert. denied 1968, 391 U.S. 935, 88 S.Ct. 1848, 20 L.Ed.2d 854. *Accord, Robins* v. *Schonfeld,* S.D.N.Y.1971, 326 F. Supp. 525; Patrick v. I. D. Packing Co., Inc., S.D. Iowa 1969, 308 F.Supp. 821; Born v. Cease, D.Alas. 1951, 101 F.Supp. 473, 13 Alaska 518, aff'd sub nom. Born v. Lambe, 9 Cir. 1954, 213 F.2d 407, 15 Alaska 60, cert. denied 1954, 348 U.S. 855, 75 S.Ct. 80, 99 L.Ed. 674; *see* Hall v. Cole, 1973, 412 U.S. 1, 3-4, n. 3, 93 S. Ct. 1943, 36 L.Ed.2d 702; Eisman v. Baltimore Regional Joint Board of the Amalgamated Clothing Workers, D.Md. 1972, 352 F.Supp. 429, aff'd 4 Cir. 1974, 496 F.2d 1313. Compare Fulton Lodge No. 2 of International Association of Machinists v. Nix, 5 Cir. 1969, 415 F.2d 212, 220 n. 23, aff'g in part, N.D.Ga. 1967, 262 F.Supp. 100, cert. denied 1972, 406 U.S. 946, 92 S.Ct. 2044, 32 L.Ed.2d 332, *with* Int'l Bhd. of Boilermakers v. Braswell, supra. Here the complaint charges that the action taken was intended to interfere with Title I rights 'pursuant to a conspiracy to violate plaintiff's rights.' Therefore, we cannot say at this juncture that plaintiff will be unable to prove the requisite malice."

With particular reference to labor unions and union officials, Goldman, J. said in *Fittipaldi* v. *Legasse* (4th Dept.) 18 AD 2d 331, 334:

"Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members to a fair and democratic hearing on legitimate disciplinary charges."

Obviously these authorities apply with equal weight to the cause of action sounding in the common law tort of malicious prosecution.

POINT IX

The defendants' failure to state specific grounds in their post trial motion under Rule 50(a) should preclude them from raising such issues in this court.

No motion for a directed verdict under Rule 50(a) was made by any of the defendants at any stage of the proceedings below. But the defendants did move for a dismissal at the close of plaintiff's case (501-521A) and at the close of all the evidence (561-562A; 564-565A). We recognize that the district court was correct in treating that motion under Rule 41(b) as a motion for a directed verdict under Rule 50(a).

But Rule 50(a) requires that the motion "shall state the specific grounds therefor".

The defendants' motion "to dismiss" did not state the specific grounds upon which they relied in making their Rule 50(b) motions and which they now attempt to raise on these appeals. In the absence of a statement of the specific grounds of a motion for a directed verdict, an appellate court will not ordinarily consider the question of the denial of the motion. In *Virginia-Carolina Tie & Wood Co.* v. *Dunbar* (4 Cir. 1939) 106 F.2d 383 the court (Parker, C.J.) said at p. 385:

> ". . . we think it important that this requirement of the rule be observed, particularly in view of the enlarged powers granted the court with respect to such motions, by Rule 50(b), as otherwise judgment might be entered on such a motion after the close of the trial and on a ground which could have been met with proof if it had been suggested when the motion was made. We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's posi-

> tion with respect thereto. We doubtless have the power to consider such motion even though the grounds be not stated, if in our opinion this is necessary to prevent a miscarriage of justice; but in ordinary cases, . . . the grounds of the motion must be stated to avail movant in this court."

The fact that no such specific grounds were stated in defendants' motion for a directed verdict could have been* a trap for the plaintiff and for the district court as well. As Judge Gardner said in *Mutual Benefit Health & Accident Association* v. *Thomas,* 123 F.2d 353, (8th Cir., 1941) at p. 355:

> "It is only where a litigant has made motion for a directed verdict that he may ask the court to enter judgment non obstante veredicto. It is only in this manner that the question may be re-examined as a question of law. To ask the court to enter a judgment, contrary to a general verdict of the jury where no motion for a directed verdict has been interposed, is simply to ask the court to re-examine the facts already tried by the jury, and this the court may not do without violating the Seventh Amendment."

PLAINTIFF'S ANSWER TO MR. WALL'S APPEAL

The Questions Involved

It would appear from Mr. Wall's brief that the following issues are involved in his appeal.

1.

Was sufficient evidence presented to warrant the inference that Wall took part in the infringement of plaintiff's rights under the Landrum-Griffin Act?

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* And in this case was. This will appear from the plaintiff's brief as appellant.

2.

Was sufficient evidence presented to warrant the inference that Wall was a party to the criminal prosecution?

3.

Was sufficient evidence presented to warrant a finding that Wall's acts were prompted by malice?

Facts Relating to Wall

Shannon J. Wall set about his task by signing an undated Notice (387A) which forbade the "upstart" from passing out his literature in the Union hall.

He was immediately advised of the arrest (410A) and was kept abreast of the situation (410A; 409A). Although he claimed not to have known of the arrest until after the fact (392A), the jury, based on all the evidence, was entitled to discredit that claim (610A). Snow made a written report to him (485-486A). He was kept up-to-date on the progress of the criminal case (409-410A). He was immediately advised when each of the respective charges against Morrissey was dismissed (409-410A).

Wall as well as Curran had a *locus poenitentiae.*

The jury was entitled to infer that the records which had been destroyed (*supra* pp. 8-10) were damaging to Mr. Wall as well as to Mr. Curran. They were entitled to draw the inferences they obviously drew from all the circumstantial evidence presented.

Mr. Wall, Secretary Treasurer of NMU on July 1, 1971 was the heir apparent to Curran's throne. The chief threat to his expected inheritance was James Morrissey. He had concurred in Curran's earlier edict—"rather than give Mr. Morrissey space in *The Pilot*" (410A) he would shut it down (817E).

Moreover, Wall was the one who presided at the National Office meeting wherein Morrissey's ancient history of a criminal offense was spread before the entire membership (737E). Of course, no mention was made of his pardon. Wall was then running against Morrissey for the office of Secretary-Treasurer as he was when the flyer entitled "**Who Will Lead NMU?—A 'convicted felon'?**" was published. See *supra* p. 29.

Wall was the number two man on the Curran team. He was caught up in the villainy of Curran's deadly purpose. He saw here his opportunity to at once promote his personal advancement and gratify his diabolical malignity toward Morrissey. He, was more subtle in design than Curran. He was more silent in his resentment.

Curran had expressly said (817E):

> "And I warned that if the government decided that they would be given access to *The Pilot* we would not print *The Pilot* * * *"

Wall knew better than to disagree with Curran (401A).

On July 1, 1971, the Morrissey LMRDA suit to have money returned to the union had been won. (Exhibit 7). *Morrissey* v. *Curran,* 302 F. Supp. 32, aff'd in part, reversed in part, 423 F. 393, *cert. denied* 399 U.S. 728 (1970) and 400 U.S. 826 (1970). The only issues remaining at the time of the arrest were:

1. How much was to be returned to the union? Mr. Wall as Secretary-Treasurer knew the answer to that one —$674,222.60 plus (*supra,* p. 3); and

2. Were the defendants Curran, Wall, *et al.,* going to be held personally liable? No one knew the answer to that one—at that stage, but Wall knew they were in jeopardy.

Morrissey had already proved in previous elections that he was a force to be reckoned with (103A; 94A). Now

with Morrissey's latest successful LMRDA suit under his belt (*supra*) he would be a more formidable foe in the next election. Wall knew that he had to prevent this "upstart" from letting the membership know what was going on. He had to prevent him from communicating his ideas and telling the membership what he had done for them in the Courts. Wall saw his opportunity to kill two birds with one stone—he could appease Curran and secure his expectancy at the same time.

Perhaps he could even get some mileage out of a Morrissey conviction in his defense of the LMRDA action then pending in this Court—on the question of his own personal liability.

Iago-like, Mr. Wall protested his innocence to the end. But, unlike Iago, no handkerchief was required to prove Mr. Wall's involvement.

POINT I

The finding of participation and want of probable cause on Wall's part is supported by sufficient evidence.

The jury found that Wall, a high ranking union official, did participate in both the violation of Morrissey's rights under LMRDA and in his malicious prosecution and that he did so without probable cause. There was ample evidence presented to support both findings. These findings may not be disturbed.

Mr. Wall set the mission in motion when he signed the notice. He was the one to whom Snow was reporting. He was the one who had custody and control of union records (832E; NMU Constitution, Article 13, Sec. 2, p. 53). There could be no doubt that the missing records, if produced, would have been damaging to him. The jury was entitled to draw the inferences it drew. He was in on the operation from beginning to end.

POINT II

Plaintiff's Answer to Curran applies to Wall as well.

All the argument submitted in answer to Mr. Curran is applicable to Mr. Wall and we respectfully ask that that argument be incorporated herein by reference and considered on this appeal with equal weight.

PLAINTIFF'S ANSWER TO MR. SNOW'S APPEAL

The Questions Involved

Mr. Snow has presented the issues on his appeal.

Facts Relating to Snow

Since Snow was present at the time of the incident and had orchestrated the arrest, he cannot very well be heard now to argue that he had no responsibility. Indeed, although Snow has attempted to minimize his importance, Mr. Wall testified that Snow was in a decision making capacity (390A). He was the chief security officer of NMU.

The jury found malice, on Snow's part, from the fact that he had been removed, by Morrissey's suit, from the lucrative OPF (450-451A). Malice could also have been found from the massive overflow of Curran's malice which had permeated the whole NMU administration.

Snow prepared the written report of the arrest—the report that was not produced (*supra*, 8-10, 36).

POINT I

The finding of participation and want of probable cause on Snow's part is supported by sufficient evidence.

The jury found that Snow, NMU's chief of security and a former N.Y.C. police lieutenant (452A) did participate in both the violation of Morrissey's rights under LMRDA and in his malicious prosecution and that he did so without probable cause. There was ample evidence presented to support both findings. These findings may not be disturbed.

To do the deed, Snow dispatched his own lieutenant an NMU master-at-arms, James Nimmo, who had also been removed from the OPF. He bore no love for Morrissey. It was Nimmo that Snow designated to file the formal complaint.

The proof not only showed that Snow was present but also that he urged and supervised the arrest. Moreover, the proof showed that before the event Snow was "gunning" for Morrissey.

He had at the direction of the National Office of the Union (Curran, Wall, *et al.*) conducted an investigation on James Morrissey (461A). He and Curran had discussed Morrissey "often" but he couldn't recall when in relation to the July 1, 1971 incident (463A).

He had armed himself with a quote from the penal code defining certain crimes with which he expected to catch and charge Morrissey (464-465A; 478A-479A). Snow knew he was dealing with a peaceful man—a man he said "wouldn't provoke an argument" (475A).

At the time of his arrest, Morrissey was not the only one passing out literature in the Union hall (269A) but he was the only one taken to Snow's office (340-341A).

Snow had him placed under arrest (350A). Then Snow directed Nimmo to go to the precinct and file the formal complaint (351A).

POINT II

The Court properly charged the jury on Snow's liability.

The Court's charge on probable cause was unexceptionable (620-622A):

> "The defendant Charles Snow contends that at the time the charges were made, the facts as they appeared to him were that Mr. Morrissey was causing agitation and disturbance in the union hall which Mr. Snow believed would lead to fighting or violent behavior.
>
> "If you find that the facts appeared to defendant as he claims and that a reasonably prudent person would have believed that those were the facts, your finding will be that he had probable cause for believing plaintiff guilty and your verdict will be for the defendant.
>
> "If you find that the facts appeared to defendant otherwise than as he claims or that it was not reasonable for him to have believed that those were the facts, your finding will be that the defendant did not have probable cause to believe the plaintiff guilty and you will proceed to consider whether the defendant acted maliciously in initiating the prosecution.
>
> "The second offense of which plaintiff was accused was criminal trespass.
>
> "New York Penal Law, Section 140.10 states, 'A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders.'

"Defendants contend that at the time the charge was made on July 1, 1971, the facts as they appeared to them were that they were entitled to exclude Mr. Morrissey from the union hall for expressing his views by passing out literature in the hall and that it was unlawful for him to remain there and to continue to pass out literature when they asked him to cease and desist or otherwise to leave.

"If you find for plaintiff on this claim, you must decide, relative to each defendant whether that defendant believed that it was unlawful for Mr. Morrissey to remain in the union hall after he had been asked to leave and whether a reasonably prudent person would have so believed.

"If you find that the facts appeared to defendants as they claim and that a reasonably prudent person would have believed that these were the facts, your finding will be that he had, that is the defendant you are considering, had probable cause for believing the plaintiff guilty and your verdict will be for that defendant.

"If you find that the facts appeared to defendant otherwise than as he claims or that it was not reasonable for him to have believed that those were the facts, your finding will be that defendant did not have probable cause to believe plaintiff guilty and you will proceed to consider whether defendant acted maliciously in initiating the prosecution."

No objection to that portion of the charge was taken.

The verdict indicates that the jury found that the facts appeared to this defendant otherwise than he claims or that it was not reasonable for him to have believed that those were the facts. The evidence fully supports that verdict.

POINT III

Plaintiff's Answer to Curran applies to Snow as well.

All the argument submitted in answer to Mr. Curran is applicable to Mr. Snow and we respectfully ask that that argument be incorporated herein by reference and considered on this appeal with equal weight.

PLAINTIFF'S ANSWER TO THE NMU'S APPEAL

Statement

NMU has appealed from the denial of its motion for judgment N.O.V. on the plaintiff's causes of action for compensatory damages.

The Question Involved

Was there sufficient evidence to support the verdicts that the union was responsible for the acts which resulted in the imposition of compensatory damages?

Statement of the case

The facts relevant to this issue have been stated in the plaintiff's Brief submitted on his appeal from the judgment n.o.v. which dismissed the complaint for punitive damages against the union. They are incorporated here by reference.

Plaintiff's contentions

The plaintiff's contentions in support of the verdict for compensatory damages are the same as made by the plaintiff in his brief, submitted on his appeal from the judg-

ment N.O.V. which dismissed the complaint for punitive damages against the union, *viz:*

1. The actions founded on LMRDA do not require proof of ratification by the union membership.

2. The charge told the jury (652-653A):

(a) that they could find against the union if they found that the acts done were within the scope of the authority of the officers; (b) that acts were within the scope of their authority if done while they were engaged generally in the business of the union to which they had been assigned, or (c) that the acts were within the scope of their authority if such acts could reasonably be said to be necessary or incidental to their employment.

There was no objection to this charge. It then became the law of the case.

3. When the jury found that the officers were acting within the scope of their authority as thus defined, ratification by the union membership should not be required.

4. If ratification, on top of authorization, is required the attempt by NMU, at the trial, to justify the posted notice, the arrest and the prosecution, were ratification.

The argument and authorities supporting these contentions will not be repeated here. The same arguments and authorities support the verdict for compensatory damages against the union as support the verdicts for punitive damages against the union.

ARGUMENT

POINT I

The scope of this brief will be limited to answering the sole point made by the union appellant in its brief.

The appellant has argued that since Judge Ward set aside the verdicts for punitive damages against the union, to be consistent, he should also have set aside the verdicts for compensatory damages. They say that the law of *Martin* v. *Curran*, 303 N.Y. 276, applies with equal force to each cause of action.

The plaintiff claims that his judgment for compensatory and punitive damages under LMRD is not governed or affected by *Martin* v. *Curran*, but agrees that *Martin* v. *Curran*, if applicable at all, applies with equal force to both the compensatory and punitive damages suffered under the common law tort of malicious prosecution.

But the plaintiff insists, for the reasons briefly outlined *supra*, and detailed in the plaintiff's brief on his own appeal, that *Martin* v. *Curran* did not defeat either of the plaintiff's causes of action; that Judge Ward was right with respect to compensatory damages and wrong with respect to punitive damages.

Two wrongs do not make a right. That is what the Union appellant is asking this Court to do in the name of consistency. The court will do the proper and right thing when it affirms the judgments for compensatory damages and reinstates the verdicts for punitive damages. That will make for consistency too, and will also be the right and proper thing to do.

Conclusion

The District Court, who had the benefit of hearing all the evidence, weighed the matter carefully when the defendants moved pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure. His reasons for denying the said motions were set forth fully (704-723A). He concluded his opinion on that motion as follows (722-723A):

> "Upon review of the probative evidence in the case, together with the inferences which the jury could reasonably have drawn therefrom, and evaluating all the testimony, the Court is persuaded that the jury's verdict was neither unsupported by the evidence, nor against 'the right and justice of the case.' Wright and Miller, *supra,* § 2531. This Court, too, considers the abuse of their authority by persons in positions of responsibility to be a serious matter, and places high value upon individual rights to dissent, express their views, and to be free of groundless arrest. In light of the circumstances of this case, the Court does not find the verdict a miscarriage of justice."

The judgments against the individual defendants and the judgments for compensatory damages against the Union should be affirmed.

Respectfully submitted,

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ADDENDUM

Text of Statutes

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Declaration of Findings, Purposes and Policy
(29 U.S.C. 401)

SEC. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or

prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

TITLE I—BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

Bill of Rights

(29 U.S.C. 411)

SEC. 101. (a) * * *

(2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(5) SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION. —No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

Civil Enforcement
(29 U.S.C. 412)

SEC. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

(a) MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed ver-

dict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 51. Instructions to Jury: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and

the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 59. New Trials; Amendment of Judgments.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties

Rule 41. Dismissal of Actions.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

In The
United States Court of Appeals
~~for the Second Circuit~~

James Morrissey,
Plaintiff-Appellee,

v.

National Maritime Union of America,

and

Joseph Curran, Shannon J. Wall and Charles Snow,
Defendants-Appellants.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 12 State Street, Valley Stream, New York
That on January 2, 1976, he served 2 copies of Brief

on

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by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Charles Esposito

Sworn to before me this
2nd day of January, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977